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No. 84-1278

In The

Supreme Court of the United States

October Term, 1984

WAYNE J. YAMASAKI,
Director, Hawaii Department of Transportation,

Petitioner,

v.

STOP H-3 ASSOCIATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF COMMITTEE FOR H-3 AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This motion for leave to file the annexed brief amicus curiae on behalf of the Committee for H-3 and Pacific Legal Foundation (PLF) as amici in support of a petition for writ of certiorari is respectfully made pursuant to Rule 42 of the Supreme Court rules. Consent to the filing of this brief has been obtained from counsel for all parties with the exception of counsel for respondents, Stop H-3 Association, Life of the Land, and Hui Malama Aina O Ko'Olau, and such consents have been lodged with the clerk of this Court.

The Committee for H-3 is an unincorporated organization consisting of citizens of the State of Hawaii and residents of the island of Oahu who desire access to a safe, cost-effective interstate highway. The Committee for H-3 has approximately one hundred members and a seven-person steering committee that has authorized participation as amicus in this case.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for Pacific Legal Foundation is set by a 20-member Board of Trustees. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

Amici consider this case to be of special significance in that it raises the issue of proper scope of review of administrative agency decisions. Particularly, the decision of the Court of Appeals for which review is sought raises the question whether under the Administrative Procedure Act's arbitrary and capricious standard of review, the administrator is required to support a decision with clear and convincing evidence.

Congress has delegated decisional prerogatives to numerous administrative agencies and established standards of judicial review over the exercise of administrative discretion. As a public interest law firm, PLF has an interest in the preservation of proper administrative and judicial functions, so that congressional objectives designed to benefit the public are achieved in the most competent and efficient manner.

The Secretary of Transportation concluded that the community disruption, cost, and safety risks that the residents of Oahu would have to bear made alternatives to H-3's minimal use of parkland imprudent. The members of the Committee for H-3, as residents of the island of Oahu, therefore have a direct interest not before represented, in having the Ninth Circuit Court of Appeals review the Secretary of Transportation's conclusion under the proper judicial standard.

For these reasons, PLF and the Committee for H-3 request that this motion to file the annexed brief amicus curiae be granted.

DATED: February 21, 1985.

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INTEREST OF AMICUS

The interests of amici are set forth in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is officially reported at 740 F.2d 1442.

REASONS FOR GRANTING THE WRIT

Introduction

This Court should review *Stop H-3 Association v. Dole*, 740 F.2d 1442 (9th Cir. 1984), because the Ninth Circuit Court of Appeals created and applied a hybrid standard of judicial review contrary to decisions of this Court and the Administrative Procedure Act (APA). This standard of review permits a federal court to independently weigh evidence and impose its own judgment of how many homes must be destroyed, tax dollars consumed, and lives risked before parkland can be used to complete a highway. Federal law assigns to the Secretary of Transportation (Secretary), who has the necessary resources and expertise, the responsibility to evaluate these factors and exercise her judgment in the performance of duties prescribed by statute. The supervision of this Court is needed to reestablish the boundaries of judicial review and to return to the Secretary of Transportation the power granted by Congress to strike a reasoned balance between the need for safe, cost-effective highways and the need to protect parkland.

The Court Of Appeals Reviewed The Decision Of The Secretary Of Transportation Under A Hybrid Evidentiary Standard Instead Of The Arbitrary And Capricious Standard Mandated By The Administrative Procedure Act

The Secretary of Transportation's 4(f) determination[1] is properly reviewed by a court under the standard set forth in 5 U.S.C. § 706(2)(A)-(D) (Administrative Procedure Act). *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 413-15 (1971). In *Overton Park,* this Court outlined the three-part inquiry that constitutes judicial review of a 4(f) determination under APA Section 706. First, the reviewing court must determine whether the Secretary acted within the scope of her authority. *Overton Park,* 401 U.S. at 415. This requires asking whether the Secretary knew that parkland could be used to build a highway only in the absence of "feasible and prudent alternatives." *See id.* at 416. Next, the court must determine whether the Secretary's actual decision is " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Id.* at 414 (citations omitted). Finally, the court must ask "whether the Secretary's action followed the necessary procedural requirements." *Id.* at 417. The only issue amici now raise is whether the Court of Appeals reviewed the Secretary's

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[1] Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 303 (DOTA), formerly codified at 49 U.S.C. § 1653(f), prohibits the Secretary of Transportation from approving the use of federal funds to construct a highway that uses parkland unless there are no "feasible and prudent alternatives." Section 138 of the Federal-Aid Highway Act of 1966, 23 U.S.C. § 138 (FAHA), contains nearly identical language. Amici use the term "4(f)" to refer collectively to these provisions.

actual decision under the proper arbitrary and capricious standard.

The arbitrary and capricious standard does not require the Secretary's conclusions about feasibility and prudence to be supported by " 'substantial evidence.' " *Overton Park,* 401 U.S. at 414. Nor does the standard authorize a court to engage in a de novo review of the 4(f) determination. *Id.* at 415. This Court recently stated:

> "The scope of review under the 'arbitrary and capricious' standard is narrow . . . the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Manufacturers Association v. State Farm Mutual,* — U.S. —, 103 S. Ct. 2856, 2866-67 (1983) (citations omitted).

In *Stop H-3 Association v. Dole,* the Court of Appeals did not keep its review within the guidelines set forth by this Court. Instead of limiting its inquiry to whether relevant factors were considered and whether there was a clear error of judgment, the court evaluated the Secretary's 4(f) determination in light of its own independent analysis of facts in the administrative record.

A. The Secretary's 4(f) Determination Was Based on a Consideration of the Relevant Factors

The Secretary of Transportation concluded that there is no feasible and prudent alternative to the constructive use of land from Ho'omaluhia Park to complete the H-3 project. *See* Ho'omaluhia Park 4(f) Statement at 5.

This conclusion was based on a consideration of the community disruption, increased cost, and safety risks associated with the proposed alternatives. *Id.* at 3-4. These factors were clearly "relevant" to the Secretary's decision since Congress intended DOTA and FAHA to bring about the development of safe, cost-effective highways[2] and expected the Secretary to consider community disruption.[3]

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[2] DOTA's Statement of Purpose provides in part:

> "The national objectives of general welfare, economic growth and stability, and security of the United States require the development of transportation policies and programs that contribute to providing fast, safe, efficient, and convenient transportation at the lowest cost consistent with those and other national objectives, including the efficient use and conservation of the resources of the United States." 49 U.S.C. § 101, Pub. L. No. 97-449, 96 Stat. 2414 (1983).

FAHA's Definitions and Declarations of Policy provide in part:

> "[S]ince many . . . [federal-aid] highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce . . . it shall be the national policy . . . to bring all of the Federal-aid systems up to standards and to increase the safety of these systems to the maximum extent." 23 U.S.C. § 101(b).

[3] H.R. Rep. No. 1584, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 3482, states in part: "In weighing alternatives for highway location . . . consideration must be given to . . . whether people will be displaced. . . ." S. Rep. No. 1340, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 3482, 3500, states in part:

> "The committee is extremely concerned that the highway program be carried out in such a manner as to reduce in all instances the harsh impact on people which results from the dislocation and displacement by reason of highway construction. Therefore the use of parklands properly protected and with damage minimized by the most sophisticated construction techniques is to be preferred to the movement of large numbers of people."

B. The Court's Inquiry Was Not Limited to Whether the Secretary Committed a Clear Error of Judgment

Once it was established that "relevant factors" were considered, the court should not have set aside the Secretary's decision unless the challenging party could demonstrate a "clear error of judgment." The Secretary's 4(f) determination should have been given a presumption of regularity. *Overton Park,* 401 U.S. at 415. The burden of proof should have been placed on the challenging plaintiff to establish that the Secretary of Transportation acted improperly in approving the use of parklands. *Monroe County Conservation Council, Inc. v. Adams,* 566 F.2d 419, 422 (2d Cir. 1977), *cert. denied,* 435 U.S. 1006 (1978).

The Court of Appeals in *Stop H-3 Association* not only failed to afford the Secretary's decision a presumption of regularity, it actually shifted the burden of proof and demanded that the Secretary support her 4(f) determination with clear and convincing evidence. Before rejecting the Secretary's conclusion that the "Makai Realignment" is not a prudent alternative, the court states that it is *"not convinced"* that the noise, air quality, and visual impacts are "exceptional." 740 F.2d at 1452 (emphasis added). Before rejecting the Secretary's conclusion that the no build option is not a prudent alternative, the court proclaims that it is not *"wholly convinced* that the record *clearly demonstrates"* that increased traffic congestion or commuter delays would be "unusual or extraordinary." 740 F.2d at 1456 (emphasis added). These statements make it clear that the court did not set aside the Secretary's decision because the challenging plaintiff established a clear error of judgment. Rather, the court

applied a hybrid evidentiary standard of review completely inconsistent with the APA and decisions of this Court.

C. The Court Refused to Defer to the Secretary's Expertise

This Court has long recognized that administrative agencies, with their specialization, insight gained through experience, and relatively flexible procedures, are better equipped than courts to collect, analyze, and act upon technical data in the furtherance of statutory objectives. *See Far East Conference v United States,* 342 U.S. 570 (1952). It is for this reason that judicial review under APA § 706 is limited. A court is authorized to carefully examine the administrative record because it

> "must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made." *Ethyl Corp. v. Environmental Protection Agency,* 541 F.2d 1, 36 (D.C. Cir. 1976) (en banc), *cert. denied,* 426 U.S. 941.

However,

> "the court must give due deference to the agency's ability to rely on its own developed expertise. . . . [I]mmersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors." *Id.* (emphasis in original).

Whether a particular highway route is a "prudent alternative" to the use of parkland is precisely the kind of question an administrative agency, not a court, is best

equipped to answer. The Secretary of Transportation must assemble and interpret engineering studies, construction designs, cost estimates, population projections, etc., and then draw a conclusion, keeping the relevant statutory objectives firmly in mind. Because special expertise is essential to preserve the integrity of this process, " 'even under the exacting § 4(f) requirements, the judicial branch may not "fly speck" the Secretary's administrative record if it appears in its review, that all factors and standards were considered.' " *Louisiana Environmental Society, Inc. v. Dole,* 707 F.2d 116, 122-23, *reh'g denied,* 711 F.2d 1054 (5th Cir. 1983) (citations omitted).

In *Stop H-3 Association,* the court conceded "[w]e obviously do not possess the technical expertise of road-builders, and we should not interfere in the technical process of building roads." 740 F.2d at 1455. Yet in practice, the court refused to follow its own admonition.

D. The Court Imposed Its Own Judgment That the Levels of Community Disruption, Increased Cost, and Safety Hazards Created by Alternatives to H-3 Are Insufficient to Render Them Imprudent

In *Stop H-3 Association,* the Court of Appeals simply imposed its own judgment about how much community disruption, expense, and safety risk citizens must accept before parkland may be used to build a highway. This is an improper usurpation of an executive function that frustrates congressional objectives and may endanger lives.

In *Overton Park* this Court said that the scope of review under the arbitrary and capricious standard is "narrow" and that "[t]he court is not empowered to substitute

its judgment for that of the agency." 401 U.S. at 416. Inherent in this command is the principle that a court must affirm an administrative agency's decision with which it disagrees so long as the decision is rational and based on consideration of the relevant factors. *Ethyl Corp.*, 541 F.2d at 36. Although the court in this case purports to tie its holding to the "adequacy of the record," its real disagreement is with the substance of the Secretary's decision. This is apparent from the court's critique of the Secretary's reasons for rejecting the Makai Realignment and no build option.

The Court of Appeals concluded that the dislocation of one church, four businesses, and thirty-one residences is a disruption of "some magnitude" but is not of sufficient magnitude to render the Makai Realignment imprudent. This is a plain usurpation of agency prerogatives. In *National Wildlife Federation v. Lewis,* 519 F. Supp. 523 (D. Conn. 1981), *aff'd,* 677 F.2d 259 (2d Cir. 1982), the court reviewed a decision by the Secretary of Transportation to permit the construction of a connector in a metropolitan area. The court upheld the Secretary's choice of route and stated:

> "Highway construction in an urban setting necessarily involves disruptions. For that reason, decisions on the placement of highway construction are to be left to expert administrators, acting under applicable law with the advice and oversight of elected officials drawn from the affected communities. Congress has defined the factors which an agency must consider in reaching its decision. Once a federal court has determined that these factors have been considered and that the agency's decision is reasonable in light of the circumstances, the court's task is done; a

court is neither authorized nor well equipped to substitute its judgment for that of expert administrative agencies." *Id.* at 537.

An assessment of disruption requires an analysis of social, economic, and political dimensions of the community. In this case, the planned construction of H-3 was a coordinated effort between the Secretary of Transportation, Department of the Interior, Department of Housing and Urban Development, Department of Agriculture, State of Hawaii Department of Land and Natural Resources, and the City and County of Honolulu Department of Parks and Recreation. *See* Ho'omaluhia Park 4(f) Statement at 5. This is the kind of coordinated effort that makes a reasoned assessment of community disruption possible. The Secretary of Transportation was in the best position to determine whether the magnitude of disruption posed by an alternative made it imprudent, not the Court of Appeals.

The Court of Appeals also substituted its judgment about the kinds of cost that should be borne by taxpayers before parkland is used. The majority felt that another $42 million (1978 dollars) in the context of a $386 million (1979 dollars) project was not "extraordinary" enough to render the Makai Realignment imprudent. 740 F.2d at 1452. Again, the Secretary of Transportation who has the expertise and whose staff has been working with state and federal agencies planning H-3 for more than a decade is best equipped to assess the cost-effectiveness of a proposed alternative in light of statutory objectives.

The court's refusal to respect the judgment of the Secretary is perhaps best demonstrated by its repudiation of the Secretary's concern over safety risks posed by alternatives to H-3. The Secretary considered the "complex"

traffic movements, "undesirable curves," reduced speeds, and "confusing and unusual ramp configurations coupled with a high volume of merging, weaving traffic" to be drawbacks of the Makai Realignment. *See* Ho'omaluhia Park 4(f) Statement at 20-21. An "intolerable" increase in traffic congestion on presently existing highways is one safety risk cited in the Secretary's discussion of the no build option. *Id.* at 23. Nevertheless, the court set aside the Secretary's 4(f) determination because it drew different conclusions from technical data in the record and did not feel that the risk to human life was sufficiently high to justify the use of parkland. According to the court's interpretation of traffic and population projections, existing highways on the island of Oahu can be kept operating at peak capacities into the year 2000. 740 F.2d at 1456. The court claims that the ramp configuration of concern to the Secretary is not "per se unsafe" and that motorists who would use H-3 as proposed are accustomed to " 'substandard curves' " so one more such curve cannot be said to so disrupt the community that the use of parkland is warranted. 740 F.2d at 1454.

Congress intended the Secretary of Transportation to act diligently under DOTA and FAHA, to protect motorists using the interstate and federal-aid highway systems. FAHA declares national policy to include bringing all federal-aid systems "up to standards" and increasing the safety of these highways "to the maximum extent." 23 U.S.C. § 101(b). Congress has explicitly instructed the Secretary of Transportation to "give priority to those [federal-aid highway] projects which incorporate improved standards and features with safety benefits." 23 U.S.C. § 105(f). These statutory provisions make clear

that Congress did not intend parkland to be used only when traffic volume swells existing highways beyond absolute peak capacity. Nor did Congress intend to force citizens to make do with less than current, state of the art highway designs merely because they were unavailable in the past. Congress intended the Secretary of Transportation's decision to use parkland to be based on several considerations, including the opportunity to upgrade highway safety "to the maximum extent." The Secretary in this case has fulfilled this legislative mandate and amici urge this Court to set aside the Court of Appeals' attempt to interfere.

E. The Court's Hybrid Standard of Review, Combined with Its Elevation of the No Build Option to the Status of Formal Alternative, Imposes an Enormous New Burden on the Administrative and Judicial Process

The Court of Appeals considered it a requirement of 4(f) that not building H-3 at all be evaluated as an alternative to the use of parkland.[4] This requirement combined with the court's expanded scope of review means that a proposed highway which uses parkland will never be built with federal funds except in the unlikely event that the

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[4] Amici concur with Justice Wallace's conclusion that the court's majority "errs both in law and in not adopting a common sense approach" by assuming that not building H-3 is an alternative requiring formal consideration under DOTA § 303 and FAHA § 138. *See* 740 F.2d at 1466 (Wallace, J., concurring in part). Rather than directly address this issue, amici have chosen to discuss the effect of the court's treatment of the no build option when combined with its hybrid standard of review.

Secretary of Transportation can prove with clear and convincing evidence that *not* building it will affirmatively create disruptions of "extraordinary magnitude." To attempt to make this showing, the Secretary will have to speculate about the probable future conduct of all government agencies, groups, and individuals in the area as they face the growing inadequacy of the transportation infrastructure in the absence of the proposed project. The Secretary will have to construct hypothetical scenarios of disruption with no clear basis for the setting of assumptions.

Computer models, origin and destination data, and other tools of transportation analysis make possible a fair prediction of the effects of a proposed project. The most significant variable in such a prediction is usually the actual project, but it can be clearly defined and its parameters controlled. In simple terms, assumptions as to collateral events tend to flow from the project itself. A no build analysis, however, has no such controlling variable. Collateral events which are responses to the central project can be predicted with fair certainty, but in the absence of any central project, predictions of collateral events become wholly speculative. For example, it is possible to predict the relatively minor changes to other streets and roads in the area likely to accompany the construction of a new highway in any of its proposed configurations. Likewise, it is possible to accurately assess the effects of these changes on the disruption, cost, and safety of the proposed project as a whole.

To evaluate the effect of not building any highway at all, however, the Secretary of Transportation will have to identify which individual compensating projects are likely to be required given projected commuter demands. The Secretary will have to speculate as to when and how such

compensating projects may be put into effect, in light of the resources and preferences of all local communities involved. The final conclusion as to whether or not building the proposed highway is "prudent" would necessarily be based on a conjectural process in which many variables over which the Secretary has no control assume prominent significance. If the decision of the Ninth Circuit Court of Appeals is allowed to stand, the Secretary of Transportation will be faced with the perhaps impossible task of "clearly demonstrating" to a court with "wholly convincing" yet speculative data that any possible compensating transportation project will create a disruption of extraordinary magnitude.

The Court of Appeals has imposed an enormous new burden on the Department of Transportation to generate and analyze speculative data of questionable relevance. A burden of similar proportion is imposed on the federal courts. When consideration of speculative theories of how transportation needs might be met without the proposed project is coupled with the expanded, hybrid scope of review developed by the Ninth Circuit, federal courts will be confronted with vastly enlarged administrative records. Case loads also will increase because 4(f) determinations based on artificial scenarios can be readily challenged on the basis that "evidence" in the record is not "wholly convincing" of the hypothetical possibilities. Finally, the precedent set by the Court of Appeals will provide additional means of tactical delay to those who use legal process to extort one-sided resolutions of all conflicts

involving environmental and socioeconomic interests.[5] The 4(f) process will be transformed from a clearly focused analysis of the feasibility and prudence of certain alternatives, into an elaborate game of academic exercises in the conceivable.

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CONCLUSION

The scope of review of administrative agency decisions is an important question of federal law. Because the standard adopted by the majority in the case at bar conflicts with the standard specified by this Court and the Administrative Procedure Act, amici Committee for H-3

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[5] In *South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005 (5th Cir. 1980), the court noted:

> "Litigation in environmental areas may kill challenged projects by delay. Although the plaintiffs may lose on the merits, often they win as a practical matter. Attorneys fees and delay are expensive and when such costs are attributed to a project, its continuance may be no longer justified." 629 F.2d at 1014 n.9.

Like the project at issue in *South Louisiana Environmental Council, Inc.*, the H-3 project has undergone studies since its inception in the late 1960s. During the 12 years that this project has been tied up in the courts, its estimated cost of completion has ballooned from $386 million (1979 dollars) to $742 million (1982 dollars).

and Pacific Legal Foundation urge that the petition for certiorari be granted.

DATED: February, 1985.

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